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No. 76-1812

In the Supreme Court of the United States

OCTOBER TERM, 1977

KENNETH ROBERTS, ET AL., PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Department of the Interior Board of Land Appeals (Pet. App. 1g-35g) is reported at 11 IBLA 53. The opinion of the court of appeals (Pet. App. 1e-12e) is reported at 549 F. 2d 158. The opinion of the district court (Pet. App. 1d-16d) is reported at 389 F. Supp. 87.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1976 (Pet. 3; Pet. App. 1e-12e) and a timely petition for rehearing was denied on March 15, 1977 (Pet. 3; Pet. App. 1f). The petition for a writ of certiorari was filed on June 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]In an apparent typographical error, petitioners refer (Pet. 3) instead to 28 U.S.C. 1234(1), which does not exist.

QUESTION PRESENTED

Whether the Secretary of the Interior properly invalidated 2,910 mining claims located for alumina because the alumina cannot now be commercially extracted by any known method and because mining location prerequisites were not satisfied.

STATEMENT

The United States issued an administrative complaint contesting the validity of 2,910 association placer mining claims located in the Piceance Creek Basin in Colorado (Pet. App. 6g). The claims, which covered about 400,000 acres of land, had allegedly been located by Merle I. Zweifel, as agent for more than 250 co-locators (Pet. App. 6g). At the administrative hearing, claimants asserted that the claims were located for alumina (Pet. App. 6g). Alumina is the source compound for aluminum metal and does not occur freely in nature; it is found as a constituent oxide of other minerals (Pet. App. 11g). The Piceance Creek Basin contains vast oil shale deposits (Pet. App. 11g).[2]

Based upon the uncontroverted testimony at the administrative hearing that the alumina in the claims could not be economically extracted and marketed by any presently known technology, the Administrative Law Judge found that the Zweifel claims did not meet the test of present marketability under the mining laws (Pet. App. 11d). Accordingly he held the claims invalid for lack of discovery of a valuable mineral deposit. The Administrative Law Judge also held that the mineral claimants failed to comply with the staking and notice-posting requirements of the mining laws (Pet. App. 6e-7e).

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[2]The claims were not located for oil shale presumably because Section 21 of the Mineral Leasing Act of 1920, 41 Stat. 445, as amended, 30 U.S.C. 241, made oil shale a leasable, rather than a locatable, mineral (Pet. App. 6g).

The Interior Board of Land Appeals, acting for the Secretary of the Interior, affirmed the Administrative Law Judge's decision, 11 IBLA 53 (Pet. App. 3e). The district court entered summary judgment in favor of the Secretary (Pet. App. 1d-16d).

On appeal the Tenth Circuit held that (1) the district court had properly granted summary judgment against petitioners; (2) the record sustained the finding that petitioners' location procedure did not comply with applicable state law; (3) petitioners' mining claims were invalid for failure to establish a valuable mineral deposit, since no known process exists whereby alumina can be commercially extracted from the oil shale host rock; and (4) the contest proceeding was neither barred by laches, nor tainted by unfair publicity or administrative bias and prejudice (Pet. App. 1e-12e).

ARGUMENT

The decision of the court of appeals is correct and is supported by a long history of consistent administrative and judicial construction of the relevant statutes. It does not conflict either with any decision of another court of appeals or of this Court.

1. Petitioners contend that they were not required to demonstrate the marketability of the alumina, because it is intrinsically valuable (Pet. 14-15).

Unpatented mining claims become valid only after the discovery of a valuable mineral deposit within the limits of each claim. *Cole* v. *Ralph*, 252 U.S. 286, 295; *Cameron* v. *United States*, 252 U.S. 450, 456. What constitutes such a discovery is determined by the "prudent man rule." This rule was set forth in *Chrisman* v. *Miller*, 197 U.S. 313, 322, as follows:

> Where minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

In *United States* v. *Coleman*, 390 U.S. 599, 600, this Court approved as a "refinement" to the prudent man test the so-called "marketability" test under which a claimant must show that the mineral can be "extracted, removed and marketed at a profit." The marketability test is a complementary, rather than a distinct, standard (*id.* at 603) and, contrary to petitioners' suggestion, it applies to all minerals, regardless of intrinsic value. *Converse* v. *Udall*, 399 F. 2d 616, 621 (C.A. 9), certiorari denied, 393 U.S. 1025.

Since the uncontroverted evidence established that the alumina in the claims here involved cannot now be extracted commercially by any known method, the court of appeals correctly concluded that there was no discovery of a presently valuable mineral deposit under the mining laws.

2. Petitioners also contend that there is a conflict among various decisions as to whether one who locates a mining claim must satisfy state as well as federal law as to staking requirements (Pet. 18-20). In light of Point 1, *supra*, there is no occasion to reach that contention in this case. In any event, the relevant federal regulation, 43 C.F.R. 3831.1, requires (with an exception not here material) that the corners of the claim be marked by stakes. Since Zweifel himself testified that he had not staked the corners of each claim (Pet. App. 8e), the court of appeals correctly concluded that the claims were not marked in accordance with the applicable federal regulations.

3. Petitioners urge that requiring the claimant to prove the validity of his claim once the Secretary has established a *prima facie* case of invalidity violates the Administrative Procedure Act and deprives the claimant of due process (Pet. 16-18). Since the claimant is the proponent of a ruling that he has satisfied the mining laws and established a valid claim, he properly bears the burden of establishing the validity of his claim once the government has made a *prima facie* showing of invalidity. See *e.g.*, *United States* v. *Zweifel*, 508 F. 2d 1150, 1157 (C.A. 10), certiorari denied *sub nom. Roberts* v. *United States*, 423 U.S. 829;[3] *Foster* v. *Seaton*, 271 F. 2d 836, 838 (C.A. D.C.); *United States* v. *Springer*, 491 F.2d 239, 242 (C.A. 9).

4. Petitioners also argue (Pet. 15-16) that laches should bar the United States' contest to their claims. As the court of appeals recognized, no facts exist which would warrant the application of that doctrine here (Pet. App. 10e-11e). The claims involve 400,000 acres of land. Zweifel filed the claims during the period beginning in May 1966 and extending through February 1967. The government's contest proceeding was initiated August 7, 1968 (Pet. App. 10e-11e). The United States thus contested the claims with due diligence.

5. Petitioners attack the fairness of their hearing before the Administrative Law Judge and the Interior Board of Land Appeals (IBLA) (Pet. 18). As the court of appeals observed, the Administrative Law Judge was unaware of

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[3]Petitioners contend that certiorari should be granted in this case to review the ruling in *Zweifel* (Pet. 13-14). However, that case, which concerned mining claims in Wyoming, is not as petitioner asserts (Pet. 14) an adjunct to this proceeding, and the ruling there—that the government may challenge the validity of an unpatented mining claim by bringing suit to quiet title—is not at issue here, where the United States proceeded by means of an administrative complaint.

any pretrial publicity until petitioners mentioned it, and there has been no showing that the publicity affected his determinations (Pet. App. 11e). Nor did the published statements indicate any prejudgment by the IBLA (Pet. App. 11e). Thus, there was no basis for a finding that the administrative decisions lacked fundamental fairness.

6. Finally, petitioners contend that they were entitled to a jury trial *de novo* (Pet. 20-21). Although due process requires notice and a hearing in proceedings to determine the validity of a mining claim, it does not require that the hearing be judicial, rather than administrative. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336-340. Congress has entrusted the management of the public domain to the Department of the Interior, and prescribed an administrative process for the determination of claims against the public domain. *Id.* at 339. This Court has recently reaffirmed Congress' power to create statutory rights and assign their adjudication to an administrative agency. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, No. 75-746, decided March 23, 1977. Judicial review of the IBLA's determination is confined to the evidence contained in the administrative record, and petitioners were not entitled to a trial *de novo* in the district court. See *Camp* v. *Pitts*, 411 U.S. 138, 141-142. The Secretary's decision is conclusive if it is supported by substantial evidence. *Cf. Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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